

What you need to know about the Companies Act 2006

1 October 2009 - the final hurdle

As you may be aware, **1 October 2009** is a landmark date for UK companies – the final phase of implementation of the Companies Act 2006 will take place. After three years of build-up and numerous transitional provisions (too many to count), the 2006 Act will, subject to very limited exceptions, replace the provisions of the Companies Acts 1985 and 1989.

What provisions of the Act remain to be introduced?

The provisions of the Act to be introduced from **1 October 2009** include those relating to:

- formation of companies and companies' constitutions;
- shares and share capital;
- change of company name;
- registers of directors, secretaries and usual residential addresses;
- protection from disclosure of residential addresses;
- company charges;
- dissolution and restoration to the Register of Companies; and
- overseas companies.

Full implementation of the Act will also trigger a major revamp of the forms customarily filed by companies at Companies House.

What do you need to do?

Although many of the provisions going live on **1 October 2009** are restatements of the current law, there are some differences. These are often deregulatory, in line with one of the original objectives of the Act to simplify and streamline company procedures. This briefing summarises the most significant changes. It highlights where existing companies may need to take action to ensure they are ready to comply with the new requirements or, if appropriate, so that they may benefit from the deregulatory relaxations being introduced. If they have not done previously, now would be a sensible time for companies to review their articles of association and seek assistance with updating them. For specific advice please speak to your usual Mills & Reeve contact or any of the persons listed at the end of this briefing.

Formation and constitution

Forming a company from 1 October 2009

Although the remaining provisions go live on 1 October, new companies are unlikely to be registered under the 2006 Act before 5 October 2009 because of the significant changes which need to be made to Companies House systems. The procedures to be followed and documentation needed to incorporate a company will be a little different, but it will be possible from October to incorporate any type of company, including public companies, with just one shareholder. The new-style application form to register a company (**Form IN01**) that will need to be submitted in future is much longer than the existing form and will require more detailed information in certain instances, for example, regarding initial share capital and shareholdings.

New style memorandum

As part of the push towards greater simplicity, the Act makes some major reforms to the way that companies are constituted and administered. Going forward, the memorandum of association of a company incorporated under the 2006 Act will be simply “an historical snapshot” of information about the company on formation. It must be in a form prescribed by statutory instrument and will set out the company’s name, type and evidence of the intention of each subscriber to form a company and become a member (and where the company is to have a share capital on formation, to take at least one share); it will not be possible to amend the memorandum after incorporation. The new-style memorandum will not include an objects clause setting out restrictions on its operations; instead a company’s objects will be unrestricted unless otherwise specifically provided for in the company’s articles of association.

Existing companies

So far as existing companies are concerned, from **1 October 2009** the provisions of their memorandum of association, including the objects clause, will be deemed to form part of the articles of association. Existing companies will not need to notify Companies House of an alteration to their articles at this stage.

Under transitional provisions, it will be possible for existing companies to pass a special resolution before **1 October 2009** to remove provisions currently contained in the memorandum, but the resolution will not have effect until that date.

Existing companies should consider whether it would be appropriate for them to take advantage of this deregulatory measure and to remove certain or all of the provisions of their memoranda that will be treated to be part of their articles from 1 October. An example would be the removal of the company’s lengthy objects clause, giving the company unrestricted powers thereafter. However, this is unlikely to be appropriate for some types of companies such as charities and certain other companies.

New style articles

From **1 October 2009** constitutional information of the type formerly set out in the memorandum will be set out instead in the articles of association, which will also contain the rules on the internal workings of the company. Model articles of association for private, public and guarantee companies have been published that will replace Companies Act 1985 Table A as the default articles for companies incorporated from **1 October 2009**, though it will be possible still for companies to adapt the model forms to their own requirements.

Table A will continue to apply to limited companies incorporated before 1 October 2009, unless and until provisions from the model articles are specifically adopted, either in whole or in part.

If a request is made for a copy of an existing company's articles of association on or after **1 October 2009**, the company may either:

- append a copy of the provisions of its old-style memorandum that are deemed to be provisions of the articles to the articles; or
- may attach a copy of its old-style memorandum with the articles indicating the provisions that are deemed to be provisions of the articles.

As mentioned above, the automatic deeming of parts of an existing company's memorandum into its articles requires no action. However, on the first occasion on or after **1 October 2009** that an existing company amends its current articles, by special resolution, or where amendments made before **1 October 2009** take effect on or after that date, it must include the relevant parts of its existing memorandum and objects which are not deleted as part of its up to date articles of association filed at Companies House.

Existing limited companies, if making further amendment to those parts of their articles that contain the original memorandum, are not permitted to remove or alter an article that limits their liability – unless they intend to re-register to change the limited liability status of the company.

Shares and share capital

Authorised share capital R.I.P.

The Act abolishes the concept of authorised share capital, although shares must still have a nominal value. Companies will not be required to restrict the total number of shares they can allot but may do so, if they wish.

Under transitional provisions, from **1 October 2009** an existing company's authorised share capital provision (currently in its memorandum) will be treated instead as a **restriction** in its articles, setting out the maximum number of shares that the company may allot. However, in order that existing companies are able to enjoy the same simplified regime as new companies, this limit may be removed either:

- by passing an ordinary resolution amending or revoking it; or
- by adopting new articles that are silent on the maximum number of shares that may be allotted.

Although it will be possible to pass such a resolution (or adopt new articles) before **1 October 2009**, any such change does not take effect until that date. If the company's articles contain other references to authorised share capital or to unissued shares, it will be preferable to go down the route of adopting new articles in order to remove these references too, rather than simply passing an ordinary resolution.

Existing companies should consider whether it would be appropriate for them to take advantage of this deregulatory measure – it may not be suitable for some companies, such as joint ventures or companies with external investors or multiple shareholders, where members are likely to want to retain control over the maximum number of shares that may be allotted.

Allotment and issue of shares

The key change that the Act introduces in relation to the allotment of shares is that from **1 October 2009** directors of a private company with only one class of shares in issue will have the ability, by default, to allot more shares of the **same class**, unless prohibited by their articles of association. Unless there are pre-emption provisions in relation to new issues of shares that apply (either in the company's articles of association or via default provisions in the Act that have not been excluded or disapplied) directors of these companies will have an unrestricted power to allot and issue new shares in the company to whomsoever they choose, potentially by-passing and, consequently diluting, existing shareholders.

Existing private companies with one class of shares in issue may opt-in to the new regime by passing an ordinary resolution to take advantage of this new power (an ordinary resolution is permitted for this even if its effect is to change the articles of association). As with the removal of the authorised share capital limit above, although it will be possible to pass such a resolution before **1 October 2009**, any such change does not take effect until that date.

Existing private companies should consider carefully whether it would be appropriate for them to take advantage of this deregulatory measure. In smaller privately owned companies, where the directors and shareholders are one and the same people, this power may be attractive as directors' authorities to allot will not have to be renewed on an ongoing basis. However, larger private companies with bigger shareholder bases, joint ventures and companies with external or multiple investors are likely to be unwilling to grant such an unfettered right to directors to allot new shares.

Other changes to share capital

Continuing the deregulatory theme, the 2006 Act will reverse the position under the 1985 Act and permit companies to take certain steps in relation to share capital, by default. From **1 October 2009** new and existing companies will no longer be required to have specific authorisation in their articles of association to:

- reduce share capital;
- purchase their own shares;
- issue redeemable shares (private companies only); and
- purchase their own shares out of capital (private companies only).

Change of company name

In line with the objective to streamline company procedures, the Act sets out new ways to change a company's name. The current method of passing a special resolution of the members is preserved but the Act introduces a new option to change the name by other means provided for by the company's articles, for example a simple resolution of the board of directors. There is also a new power to pass a conditional special resolution to change a company's name, but it is not possible to reserve a name in advance with the Registrar of Companies.

From **1 October 2009** there will be an additional administrative task to perform when a company changes its name because there is a new requirement to notify the Registrar of Companies of the change (in addition to filing a copy of any shareholders resolution) on one of the new Companies House forms that will apply from **1 October 2009** (see below).

Registers of directors, secretaries and usual residential addresses

Registers of directors and secretaries

The Act introduces administrative changes to the statutory registers of directors and secretaries that a company must maintain. Under the 2006 Act the requirement is to keep two distinct registers – a register of directors and a register of secretaries. There is a transitional provision for existing companies that provides that a combined register kept pursuant to the 1985 Act is treated as two separate registers.

There are some minor changes to the particulars to be kept on the register of directors. All directors are permitted to provide a service address rather than their usual residential address, which can be "The company's registered office". Details of other directorships (current or former) will no longer need to be included but directors must disclose any former names if used for business purposes within the previous 20 years and there is no longer an exemption for a married woman's maiden name.

There are some similar changes to the particulars on the register of secretaries, namely use of a service address rather than usual residential address, which can be "The company's registered office"; and disclosure of former names if used for business purposes within the previous 20 years - again there is no longer an exemption for a married woman's maiden name.

There is a transitional provision that covers existing companies in relation to the revised particulars – they do not need to comply with the 2006 Act requirements to provide additional particulars in registers of directors or secretaries on 1 October 2009 but can wait until the next annual return is due.

Register of usual residential addresses

Pursuant to a new requirement in the Act **all** companies must keep a separate register of directors' residential addresses from **1 October 2009**. This register must state the usual residential address of each of the company's directors and applies only to individual directors (not bodies corporate or firms). If a director's usual residential address is the same as his service address (as stated in the register of directors) the register need only contain an entry to that effect, but this does not apply if the service address is stated to be "The company's registered office". There is no right of inspection or rights to copies of this register by members or any other person. The information in it is classed as "protected information" that must be kept confidential by the company.

Use of single alternative inspection location

Regulations made under the Act that come into effect on **1 October 2009** will permit the use of a single alternative inspection location (commonly known as a **SAIL**). This is an alternate location (instead of the registered office) at which a company's records that are required to be available for inspection, may be kept. Examples include the register of directors and the register of charges. Companies might nominate the address of an adviser as a SAIL.

The SAIL (which must be the same place for all relevant registers and records) must be situated in the same part of the UK (for example, England and Wales, Wales, Scotland or Northern Ireland) as the company's registered office. This is sufficiently flexible for a company to select an alternative location appropriate to its business.

Companies must notify the Registrar of Companies of the use of a SAIL, and specify which of the company records, for example, the register of members, are held at the SAIL. Any return of company records from the SAIL to the registered office must be notified too and a full list of the company records held at the SAIL must be included in the company's annual return. The inclusion of the information in the annual return was considered to be a convenient and easy way of making the disclosure, as well as providing an annual reminder to companies to keep the information up to date.

Protection from disclosure of residential addresses

Broadly speaking, at present only persons who can show that they are at risk of intimidation or violence are able to make use of a service address, rather than their residential address, in records kept by the Registrar. From **1 October 2009** the Act will open up this protection to **all** directors (not just those at risk of violence or intimidation) who be able to use a service address in place of their usual residential address in records kept by Companies House that are available for public inspection. Company secretaries will be able to use a service address too.

Under the new regime every director will have to file two addresses: a service address for the public record and a home address. Only the service address will be made public (although certain bodies carrying out public functions and credit reference agencies may still be permitted to access usual residential addresses). Also there are detailed regulations setting out the circumstances in which it will be possible to apply to the Registrar:

- to prevent the disclosure of a residential address to credit reference agencies; and
- to remove residential addresses of some directors and shareholders from historic company records from 2003 onwards (when Companies House began holding records electronically rather than on microfiche).

Fears have been voiced that unscrupulous directors will be able to hide behind service addresses, thus facilitating the operation of phoenix company scams, where new companies are formed from the remnants of failed companies, to the detriment of creditors. However it must be remembered that it is relatively straightforward to trace a director's home address via other publicly available sources such as electoral records or directory enquiry services, so the effectiveness of the new regime has to be questioned.

Under transitional arrangements, the address shown on the register for directors of existing companies on **1 October 2009** is deemed to be his service address. A director must notify the Registrar of Companies from that date if he wants to change it, for example, to the registered office, using one of the new Companies House forms (see below).

Company charges

The 2006 Act does not make any radical amendments to the current regime that UK registered companies will be familiar with under the Companies Act 1985, in relation to the registration of company charges at Companies House. The categories of charge and mortgage requiring registration are unaltered, as is the 21 day period within which charges must be registered.

However there is one change of significance that is being introduced concerning the rules on registration of charges granted by overseas companies over property situated in the UK. Only overseas companies registered under the new "UK establishment" regime (see Overseas companies below) will be caught by the rules to register charges granted over property in the UK. Unregistered overseas companies will not be caught by these rules and therefore the current practice of making filings in the Slavenburg Register kept by the Registrar of Companies will cease.

Dissolution and restoration to the Register of Companies

Again, the provisions of the 2006 Act in relation to the dissolution of a company and restoration to the Register are broadly a restatement of the existing law with some amendments. The key changes to note are that from **1 October 2009**:

- public companies will be able to apply voluntarily to strike themselves off the Register (only private companies are able to do so at present);
- a new procedure will be introduced (administrative restoration) whereby companies may be restored to the register by the Registrar without an application to court. This procedure will only be available in certain limited circumstances and will be in addition to the ability to apply to court for restoration to the register; and

- a single court procedure to have a company restored to the register will replace the current two alternative court procedures, and there will be a time limit of six years from the date of dissolution of the company in which to make the court application (in non-personal injury related cases).

Overseas companies

From **1 October 2009**, the Act introduces a new single regime for registration, filing and disclosure requirements for overseas companies that wish to establish a business in the UK, but which do not want to incorporate a UK subsidiary or appoint an agent. The current dual regime, widely considered to be confusing, that distinguishes between “branches” and “places of business” is to be replaced by the single concept of a “UK establishment”. This is defined as a branch within the meaning of the Eleventh Company Law Directive (89/666/EEC) or any place of business that is not such a branch that is located within the UK.

Overseas companies that register a “UK establishment” at Companies House must comply with the new requirements for filing certain forms and documentation on initial registration and on any subsequent alteration of particulars. There are also detailed rules on delivery of accounting information, and they must adhere to a 2006 Act style regime for ongoing trading disclosures and protection from disclosure of usual residential addresses.

Under transitional provisions, overseas companies with existing registered branches or places of business in the UK are treated as having made the returns required for initial registration but must deliver a transitional return to Companies House by **31 March 2010** containing certain additional information. Non statutory guidance is currently being prepared and Companies House will be writing to all registered overseas companies shortly.

Changes at Companies House

As a result of the implementation of the Act, all of the very familiar forms required to be filed at Companies House during the course of a company's life are being changed and renamed. If companies have paper stocks of annual returns or forms for notifying changes to directors, secretaries or registered office, they will have to be thrown away shortly. It will not be possible to use them after 1 October 2009 and Companies House will reject any old style forms that are submitted.

Drafts of the new forms and related guidance are now available on the Companies House website. These are in draft format and are subject to change, but give an idea of the final versions in readiness for 1 October 2009. The forms had to be changed, if only to remove references to sections of the Companies Act 1985 that have been or will be repealed. The new section numbers in the 2006 Act appear on the forms but not in the heading, instead the new forms have descriptors relating to their functionality. For example, the annual return is now Form AR01 and forms relating to the appointment, change of details and termination of an individual director are Forms AP01, CH01 and TM01 respectively.

Action checklist for existing companies

Company constitution

- Provisions in the company's memorandum of association are deemed into its articles of association from **1 October 2009**, so consider whether the deletion of the company's objects clause and any other provisions that are carried over, by passing a shareholders' special resolution, will be appropriate.
- On the first occasion that any changes are made to the articles after **1 October 2009**, ensure that provisions of the memorandum that are deemed to be provisions of the articles are included in the new print (assuming they have not been deleted), in particular, the statement of limited liability.
- Conduct a general review of articles and update them, if not previously done so, in the light of the changes introduced by the 2006 Act over the past three years.

Shares and share capital

- Consider whether it is appropriate to pass a shareholders' ordinary resolution or to adopt new articles to amend or revoke the authorised share capital provision in the memorandum that will become a restriction in the company's articles, setting out the maximum number of shares that the company may allot.
- If the company is a private company with one class of shares in issue, consider lifting the restriction on directors' authority to allot shares to benefit from the relaxation permitted by the Act.
- Where relevant, update articles to take account of other changes to the share capital regime introduced by the Act.

Change of company name

- Consider amending the articles to include an alternative procedure for changing the company's name, such as the passing of a resolution of the board of directors.
- Remember to file the new Companies House form with any change of name of the company from **1 October 2009**.

Registers of directors, secretaries and usual residential addresses and use of SAIL

- Put in place administrative arrangements to establish and maintain the new register of directors' residential addresses that all companies must keep.
- Collate additional particulars (if any) that will be required to be disclosed in the registers of directors or secretaries (from the first annual return after **1 October 2009**).
- Ascertain whether directors want to swap their current residential address on the record for a service address and file the appropriate form at Companies House.
- Become familiar with new regime for protection of directors' residential addresses, brief relevant personnel and put in place suitable procedures for protection of "protected information" in connection with legal and regulatory requirements (such as the inspection of directors' service contracts) and other day to day activities.
- Consider whether an application is desirable to remove information about residential addresses from Companies House records after 1 January 2003.

- Decide whether the use of a Single Alternative Inspection Location for keeping certain company books and records is preferable to keeping them at the company's registered office.

Generally

- Get ready to dispose of stocks of old style Companies House forms and obtain new style ones to be used from **1 October 2009**; and
- ensure that appropriate personnel remain up to speed on the changes made by the Act and that they review any non statutory guidance issued by the Department for Business, Innovation and Skills and by Companies House from time to time.

More briefings on the Act

More briefings are available on the [Companies Act 2006 page](#) on our [website](#).

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